

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS OARD

CLARK COUNTY NATURAL RESOURCES
COUNCIL and FUTUREWISE,

Petitioners,

v.

CLARK COUNTY,

Respondent,

and,

JOHN AND GEORGIANA WARTA, GREEN ARBOR
DEVELOPMENT, INC., MATTHEW and DENISE
HOUGHTON, RICHARD W. SCHWARZ, WALTER
O. SCHWARZ, JONATHAN and VICTORIA
SCHWARZ,

Intervenors.

Case No. 09-02-0002

**ORDER DENYING MOTIONS TO
DISMISS**

This matter comes before the Board on Motions filed by Intervenors John and Georgiana Warta and Green Arbor Development, Inc. ("Warta") and Matthew and Denise Houghton ("Houghton") seeking dismissal. The Warta Motion requests dismissal of Petitioner's Issue 2 claims as that Issue applies to Warta's property. The Houghton Motion requests dismissal of the Petition for Review in its entirety. Arguments made in support of both motions are similar: 1) The Petitioners are alleged to lack standing, and; 2) The Board is alleged to lack subject matter jurisdiction. Due to the similarity of the arguments supporting both motions, they will be addressed together.

Lack of Standing

Warta and Houghton argue that the Petitioners lack standing due to a failure to comply with Clark County Code 40.510.040E. The moving parties further state that the Board of County Commissioner's decision approving Ordinance No. 2008-12-15 involved a Type IV

1 application and was thus subject to the appeal requirements of the referenced section of the
2 Clark County Code.

3 The action of the board in approving or rejecting a recommendation of the planning
4 commission shall be final and conclusive unless a land use petition is timely filed in
5 superior court pursuant to RCW 36.70C.040 (Section 705 of Chapter 347, Laws of
6 1995); provided, that no person having actual prior notice of the proceedings of the
7 planning commission or the board's hearings shall have standing to challenge the
8 board's action unless such person was a party of record at the planning commission
9 hearing. CCC 40.510.040E

10 Their position is that both Petitioners had actual prior notice of the proceedings and
11 that neither Petitioner was a party of record before the Planning Commission. ¹

12 In response to the standing challenge CCNRC and Futurewise refer to RCW 36.70A.280
13 (2)(b), which establishes the requirements for participation standing under the Growth
14 Management Act (GMA). Petitioners allege they submitted comments to the County during
15 the process, albeit to the Board of County Commissioners,² and subsequently filed their
16 Petition for Review within the required 60 days. The Petitioners further argue that RCW
17 36.70A.280(2)(b) expressly confers standing upon them and that Clark County lacks
18 authority to establish standing requirements in conflict with state law.³
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21 In this instance, the moving parties argue that the more restrictive Clark County standing
22 requirements should prevail. The Board finds that the GMA clearly establishes the standing
23 requirements for bringing a challenge to a local planning decision. While counties and cities
24 have the power to enact ordinances covering subjects already covered by state law, they
25 may only do so when the state law was not intended to be exclusive and the local law does
26 not conflict with state law. Here it appears to the Board that the state law was intended to
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31 ¹ Houghton Motion to Dismiss at page 2; Warta Motion to Dismiss at pages 2-5.

32 ² A fact acknowledged by Warta (at pg. 4 of their Motion to Dismiss) and Houghton (at pg. 2 of their Motion to Dismiss).

³ Petitioners' Response to Substantive Motions, at pg. 8

1 be exclusive and that the local ordinance is in conflict. The Motions to Dismiss based on
2 participation are denied.

3 4 **Lack of Subject Matter Jurisdiction**

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6 The moving parties' arguments that this Board lacks subject matter jurisdiction are similarly
7 based on CCC 40.510.040E, focusing in this instance on the first clause:

8 The action of the board in approving or rejecting a recommendation of the planning
9 commission shall be final and conclusive unless a land use petition is timely filed in
10 superior court pursuant to RCW 36.70C .040 . . .

11 Their argument is that Petitioners failed to follow the appeal procedure as they only filed with
12 the Growth Management Hearings Board and not with the Superior Court under RCW
13 36.70C.040 (LUPA). They suggest the appeal was unperfected due to that failure, thus
14 denying this Board subject matter jurisdiction.⁴
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16 Petitioners point out that the County's legislative action involved a comprehensive plan
17 amendment to de-designate agricultural resource lands. They argue such a change can
18 only be accomplished in a manner consistent with the GMA.⁵ In that regard the Coffey
19 decision cited by both the moving parties and Petitioners supports the Petitioners'
20 argument.⁶ As in Coffey, the Petitioners' challenge here is based on an alleged failure of
21 the local jurisdiction to comply with the GMA, an area over which the GMHBs have exclusive
22 jurisdiction. In Coffey, a property owner and developer requested that Walla Walla amend
23 its comprehensive plan as it pertained to approximately 50 acres of recently annexed land.
24 The City ultimately approved the comprehensive plan amendment and the appellants filed a
25 LUPA petition challenging that amendment. The court held that LUPA is not the appropriate
26 method of challenging a comprehensive plan amendment.
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32 ⁴ Houghton Motion to Dismiss at pg 3; Warta Motion to Dismiss at pgs 8, 9.

⁵ Petitioners Response to Substantive Motions at pg. 11.

⁶ Coffey v. City of Walla Walla, 145 Wn. App. 435 (2008).

1 Appellant's attempt to use the LUPA process to challenge the amendment was
2 not statutorily authorized. The Superior Court lacked subject matter jurisdiction
3 to consider the claim since the GMHB had exclusive authority to do so.⁷

4 The court stated that the GMHBs are responsible for ensuring that decisions regarding the
5 broad nature of local area planning are consistent with state law. As was further stated by
6 the Coffey court:

7 Consistently, RCW 36.70A.280(1)(a) expressly gives jurisdiction to the GMHB over
8 petitions alleging that a local jurisdiction "is not in compliance with the requirements
9 of this chapter." . . . The GMA, then, clearly contemplates that challenges to
10 comprehensive plan amendments must be brought before the GMHB.⁸

11 The Board interprets Coffey to stand for the proposition that filing both a LUPA and a GMA
12 action is necessary to challenge both a zoning and policy decision but is not necessary
13 when challenging a legislative decision that may incidentally impact a land use decision.
14 The Motions to Dismiss based on a lack of subject matter jurisdiction are denied.
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16 Dated this 23rd day of April, 2009.
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William P. Roehl, Board Member

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James McNamara, Board Member

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Nina Carter, Board Member
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⁷ Coffey at 438.

⁸ Coffey at 439.